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No. 03-1401

Supreme Court, U.S.
FILED
MAY 10 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SOUTH DAKOTA DEPARTMENT OF REVENUE,

Petitioner,

v.

LOREN POURIER, D/B/A MUDDY CREEK OIL & GAS, INC., AND MUDDY CREEK OIL & GAS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

BRIEF *AMICUS CURIAE* OF THE STATES OF IDAHO, ALABAMA, KANSAS, LOUISIANA, NEBRASKA, NORTH DAKOTA AND UTAH IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE*

The States of Idaho *et al.* respectfully submit, pursuant to Sup. Ct. R. 37.4, a brief *amicus curiae* in support of the Petition for Writ of Certiorari.

INTEREST OF *AMICI CURIAE* STATES

State motor fuel taxation is unusual for at least one important reason: The resulting revenue typically is devoted to expenditure for the construction, maintenance, and repair of highways, roads, other transportation-related infrastructure, and associated administrative responsibilities.[1] The exaction thus facilitates the very activity to which the tax relates, namely, the operation of motor vehicles. States have a practical interest in maximizing collection of such revenue given the centrality of transportation infrastructure to their overall economies and a policy interest in ensuring that all persons who benefit from this infrastructure bear their fair share of its costs.

Congress recognized these interests when it adopted section 10 of the Hayden-Cartwright Act in 1936. Act of June 16, 1936, § 10, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104) ("Hayden-Cartwright Act") (App. 1). The language used in the statute meshes straightforwardly with the congressional purpose; *i.e.*, the

[1] The Federal Highway Administration has prepared a summary of each State's statutorily-mandated disposition of motor fuel taxes as of January 1, 2001. *See* http://www.fhwa.dot.gov/ohim/hwytaxes/2001/tab6_toc.htm (last visited Apr. 24, 2004).

Act subjects gasoline or other motor fuels sold on United States "reservations" to the same state taxes imposed elsewhere and thereby ensures that *all* fuel sales in the State are taxed. By virtue of the Hayden-Cartwright Act, no tax-free geographical vacuums exist. Congress explicitly considered whether exceptions to this general requirement should be made and exempted only fuel sold for the Federal Government's "exclusive use."

Notwithstanding the clarity of Congress' direction, the South Dakota Supreme Court applied the Indian canons of construction to reach the conclusion that the term "reservations" does not encompass Indian reservations. The decision below ignored this Court's instruction that tribes and tribal members are presumptively subject to "general" federal statutes identically to other United States citizens. It also failed to recognize that the canons apply only to Indian treaties or Indian-related legislation. Accordingly, they have no role in this case. The Petition's first question offers this Court an opportunity to reiterate these core principles and, in so doing, to carry out Congress' manifest objective in adopting the Hayden-Cartwright Act.

The South Dakota court compounded its misapprehension of federal Indian law standards with respect to construing general federal legislation by concluding that an artificial entity, Respondent Muddy Creek Oil & Gas, Inc., enjoys immunity from the state fuel tax merely because a tribal member, Respondent Pourier, is the corporation's sole shareholder. This Court has devoted substantial attention to developing a consistent set of standards for demarcating the permissible scope of state tax jurisdiction on Indian reservations. A fundamental component of this jurisprudence is that, absent a contrary congressional directive, States possess the same measure

of taxing authority over Indians who are not members of the reservation's governing tribe as over non-Indians. Consequently, in the exercise of their taxation power on Indian reservations, States rely on tribal member, not merely Indian, status as the initial step in analyzing and resolving jurisdictional issues. The decision below ignores that settled distinction and undermines this Court's efforts to establish concrete preemption standards in a sensitive and often complex area of Indian law. The *amici* States have a strong interest in immediate correction of this departure from core doctrinal principles.

STATEMENT

1. Respondents are an individual member of the Oglala Sioux Tribe and Muddy Creek Oil & Gas, Inc. ("Muddy Creek"), his wholly-owned corporation created under South Dakota statutes. Pet. App. 15-16, 56; *see* S.D. Codified Laws §§ 47-1-1 through 47-7-59. Muddy Creek is licensed under state law as a fuel importer, exporter, marketer, and transporter. Pet. App. 16, 57; *see* S.D. Codified Laws §§ 10-47B-59, 10-47B-60, 10-47B-61, 10-47B-65. Among its retail outlets is a convenience store on the Pine Ridge Indian Reservation where it sells fuel predominately to Indian residents on the Reservation. Pet. App. 16, 56. The fuel is purchased in Nebraska by Muddy Creek and transported to the reservation outlet in Respondent Pourier's trucks. Pet. App. 57.

South Dakota imposes a 22-cents-per-gallon tax on motor fuel and assigns the tax's legal incidence to the ultimate consumer in return for the privilege of operating motor vehicles on state roads. S.D. Codified Laws §§ 10-47B-4(1),

10-47B-42; *see* Pet. App. 32-33. Muddy Creek, when acting as an importer, is required to pre-collect and remit the tax. S.D. Codified Laws § 10-47B-22; *see* Pet. App. 57. It then passes the tax amount through to the consumer as part of the fuel's purchase price. Pet. App. 58. All fuel tax remittances are placed into a motor fuel tax fund (S.D. Codified Laws § 10-47B-148), with distributions made monthly for specified purposes, including payment of motor fuel tax refunds and administrative costs, and with the balance transferred to the state highway fund (*id.* § 10-47B-149). South Dakota maintains the principal highways that traverse the Reservation. Pet. App. 20 n.2.

2. This litigation began when Muddy Creek filed refund claims totaling almost $1 million for all tax amounts remitted since July 1995 with respect to fuel imported for sale at the reservation outlet. Pet. App. 17. Muddy Creek contended in relevant part that the state tax was preempted by federal law and that, as an importer, it bore the tax's legal incidence. Its claims were denied administratively and on judicial review by a state circuit court on the ground that the motor fuel tax was authorized by the Hayden-Cartwright Act. Pet. App. 16, 45-50, 51.

The South Dakota Supreme Court reversed and remanded for further proceedings with respect to refunds claimed by actual consumers, including Muddy Creek. The first question addressed was whether the Hayden-Cartwright Act applied to Indian reservations. In answering this question, the court began with the principle that "[a] state has no power to tax tribes, Indian reservation lands, or tribal members residing on Indian reservations unless there has been a cession of jurisdiction or other federal statute permitting the tax." Pet. App. 18-19. It then added two canons of construction to the analysis: The

requisite congressional authorization to tax must be "'unmistakably clear,'" and where two constructions are possible, the statute must be interpreted in favor of the tribes or their members. Pet. App. 19.

Against this "necessary background" (Pet. App. 19), the court first rejected Petitioner's contention that a "plain reading" of the Hayden-Cartwright Act, and particularly its use of the terms "other reservations" and "licensed traders," reflected clear congressional intent to encompass Indian reservations. It relied on the Indian canons for this determination:

- "[A]n Indian reservation has distinct characteristics unique from those of other federal government reservations. . . . [F]ederal reservations, such as national parks and monuments and military posts, are created and maintained for the benefit of the federal government. Indian reservations were created for the benefit of the tribes. To assume that in this one instance Congress implicitly relied on this definition to abrogate Indian tax immunity is to ignore the context of the Court's definition and the requirement that Congress manifest its *clear* intent that the Indian in Indian country is taxable." Pet. App. 23.

- Inclusion of "licensed traders" within the Act's coverage did not warrant construing the statute as applicable to Indian reservations because "[e]ven if we accept the proposition that the term 'licensed trader' was an Indian law term of art in the federal courts, there is no sign that Congress treated it as such. Congress gave no indication in the statute that the term referred to Indian traders as

opposed to those non-Indian traders who were required to obtain a license to sell fuel." Pet. App. 24.

- Petitioner's reliance on a United States Department of the Interior Solicitor opinion, 57 Interior Dec. 129 (1940) (Pet. App. 84), which concluded that gasoline sales through a commissary on an Indian reservation were subject to the Act, was unwarranted because "[t]he Solicitor's equivocation regarding whether the Act applied to Indian reservations and his admission that the 'indications' that the Act applied to Indian reservations were 'slight' are simply not enough to overcome the presumption that Indians on Indian land retain tax immunity." Pet. App. 25.

- The circuit court erred in assigning any interpretative significance to Congress' failure to amend the Act after the Solicitor's opinion because "[w]e cannot find 'unmistakably clear' congressional intent by negative implication." Pet. App. 25.

In sum, "[t]he vague language of the Act, and Congress' failure to even address Indian tax immunity either in the Act or the legislative history, lead us to the conclusion that it failed to manifest unmistakably clear intent to abrogate Indian tax immunity." Pet. App. 27.

The court then turned to the issue of which economic actor bears the legal incidence of the fuel tax. It rejected Respondents' position that Muddy Creek, as an importer and "marketer," bore such incidence, relying on the South Dakota legislature's explicit allocation of incidence to the consumer. Pet. App. 32. That determination, however, did not end the inquiry because, in the court's view, not only

did Muddy Creek have standing to challenge the tax through its obligation to prepay the tax but it also acted as a consumer when purchasing fuel for its transport trucks. Pet. App. 33.

On the latter point, the court held that, notwithstanding Muddy Creek's status as a South Dakota corporation, it was entitled to the same immunity from state taxation because its sole shareholder is a member of the Reservation's governing tribe. Pet. App. 29. It reached this determination as a matter of federal law, relying on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), for the apparent proposition that corporations, despite their lack of racial identity, may "assert claims under [42 U.S.C.] § 1981 based on the fact that a corporation was owned or managed by persons with identifiable racial identity." Pet. App. 30. It additionally pointed to regulations under the Indian Business Development Program allowing "Indian corporations" to make grant funding applications. Pet. App. 31 (citing 25 C.F.R. § 286.3). Last, the court identified "[p]olicy considerations" that merited extending tax immunity to Muddy Creek, including interfering with "tribal independence and development" by "forc[ing] economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law." *Id.*[2]

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[2] The decision below also discussed, and rejected, a procedural due process claim advanced by Respondents and a statute-of-limitations issue. Pet. App. 34-36. The latter issue was revisited on rehearing in a separate opinion. Pet. App. 1-14. Neither issue is relevant to the questions presented in the Petition.

ARGUMENT

I. THE HAYDEN-CARTWRIGHT ACT IS A "GENERAL" LAW AND NOT INDIAN LEGISLATION. THE SOUTH DAKOTA COURT'S DECISION THEREFORE RAISES THE IMPORTANT QUESTION WHETHER THE INDIAN CANONS APPLY TO THE STATUTE'S CONSTRUCTION.

The South Dakota Supreme Court's conclusion that the term "reservations" in the Hayden-Cartwright Act does not extend to Indian reservations was predicated on its application of the Indian canons of construction. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (summarizing Indian canons relevant to taxation). No legitimate dispute exists that, but for the assumed applicability of those canons, the ordinary meaning of "reservation" would control and that Indian reservations would have been included within the statute's scope. An Indian reservation, after all, is nothing if it is not a "reservation" – *i.e.*, an area of land set aside by the United States for a particular federal purpose. *E.g.*, *United States v. Celestine*, 215 U.S. 278, 285 (1909) ("The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide"). The threshold, and here decisive, question in resolving the Hayden-Cartwright Act issue is thus whether the canons apply. The South Dakota court's assumption that they do is problematic for two reasons.[3]

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[3] The South Dakota court's assumption concerning the Indian canons paralleled the analytical approach employed in the four other

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First, the Act applies in all "United States military or other reservations" with respect to fuel "sold by or through post exchanges, ship stores, ship services stores, commissaries, filling stations, licensed traders, and other similar agencies." It is thus a statute of general geographic and substantive applicability within the United States as to the subject at hand – fuel sold on federal "reservations." Congress, in other words, was addressing a national concern in a national manner.[4] Under these circumstances,

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reported decisions recently addressing the Hayden-Cartwright Act's applicability to Indian reservations. *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1304-05 (D. Kan. 2003) ("the Court agrees with the Tribe and finds that the Hayden-Cartwright Act does not expressly provide for state taxation on fuels delivered in Indian country"), *appeal pending*, No. 03-3218 (10th Cir.); *Coeur d'Alene Tribe v. Hammond*, 224 F. Supp. 2d 1264, 1268 (D. Idaho 2002) ("unless Congress has been explicit in granting states authority to tax Indians, the Court should construe the statute as not allowing the taxation"), *appeals pending*, Nos. 02-35965 *et al.* (9th Cir.); *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996, 1000 (Idaho 2001) ("[b]y not using the term 'Indian reservation' or 'licensed Indian trader' in the relevant portion of the Act, Congress did not make it clear that it intended to abolish tribal immunity from state motor fuel taxation"), *cert. denied*, 534 U.S. 1189 (2002); *see also Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1305 (D. Kan. 2004) (adopting *Prairie Band Potawatomi*'s reasoning).

[4] The circumstances prompting the Hayden-Cartwright Act's adoption reflect why Congress acted comprehensively. As Petitioners have discussed, this Court held in *Standard Oil Co. v. California*, 291 U.S. 242 (1934), that a state license tax imposed on motor fuel distributors could not be applied to gasoline sold to a post exchange within the Presidio of San Francisco, a military reservation. The decision caused substantial controversy among state tax officials and resulted two years later in the Act's passage. *See* 79 Cong. Rec. 4083 (1935); 80 Cong. Rec. 6913 (1936). Had Congress desired only to overrule prospectively the result in *Standard Oil*, it would have limited the legislation to "United States military reservations." Moreover, aside from addressing the problem of "free-loading" – the ability of drivers to purchase tax-free

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this Court has held that "general Acts of Congress apply to Indians as well as to others in the absence of a clear expression to the contrary." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

Tuscarora is particularly germane here. The issue there was whether lands owned in fee by a tribe and located within its reservation (362 U.S. at 105-06 & n.10) were part of a "reservation" as defined in the Federal Power Act ("FPA") and, if not, whether they were subject to condemnation when necessary for the construction, maintenance, or operation of a federally-licensed project. "Reservation" status was significant because lands within a "reservation" were not subject to condemnation absent a finding that "their taking 'will not interfere or be inconsistent with the purpose for which the reservation was

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gas but to continue use of the state highway systems – the Act furthered another Depression Era objective – employment. Gas tax revenues, unlike many other types of tax exactions, had remained fairly constant during the early part of the Depression. United States Dep't of Transp., *America's Highways: 1776-1976*, at 123-24 (1976). As the Department of Transportation's history of the nation's highway system observed, a 1932 study had determined that "for every person employed directly on [a highway construction] job, seven others were indirectly employed making cement, aggregates, and machinery and in transporting these products through the economy [because] . . . [d]ollars . . . were much more effective when used to build roads than when used for direct relief or a dole." *Id.* at 124. To encourage road construction and attendant employment, Congress penalized States that diverted gasoline taxes from highway construction, improvement, and maintenance in the Hayden-Cartwright Act of 1934. *Id.* at 124-25; *see* Act of June 18, 1934, § 12, 48 Stat. 993, 995 (1934). The 1936 Hayden-Cartwright Act was a natural adjunct to the 1934 legislation by the same sponsors, insofar as it sought to increase state revenue for use in road construction and maintenance, and furthered many of the same national objectives.

created or acquired'" *Id.* at 109. Although the FPA's definition of "reservation" specifically included Indian reservations, this Court looked to legislative history to hold that the term was intended to apply only to "reservation" land or interests owned by the United States.[5]

This Court turned then to the Tuscaroras' contention that the FPA's condemnation provision was inapplicable to tribal fee lands. It stated that the statute "constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any streams or other bodies of water over which Congress has jurisdiction under its commerce powers" and that the "[t]he Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." 362 U.S. at 118. The Court, therefore, held that the FPA's general condemnation provision "applies to the[] lands owned in fee simple by the Tuscarora Indian Nation" (*id.*), since "it is now well settled by many decisions of this

[5] The Court reasoned that, as passed by the House of Representatives, the definition of "reservation" in the Federal Water Power Act of 1920 meant "'lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, and lands and interest in lands acquired and held for any public purpose.'" *Tuscarora*, 362 U.S. at 112. That general definition eventually was "recast" before the Senate to insert "the words 'national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other.'" *Id.* The Court explained that "[i]t seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its 'recasting' only specified, as illustrative, some of the 'reservations' on 'lands and interests owned by the United States.'" *Id.*

Court that a general statute in terms applying to all persons includes Indians and their property interests" (*id.* at 116). The South Dakota court's decision raises the question whether the Hayden-Cartwright Act, as a "general" law, presumptively applies to all persons or lands naturally coming within its terms.[6]

Second, this Court has applied the Indian canons when construing "'statutes passed for the benefit of dependent Indian tribes.'" *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)); *see also Blackfeet Tribe*, 471 U.S. at 766 ("the standard principles of statutory construction do not have their usual force in cases involving Indian law"); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) ("the [*Blackfeet*] presumption [requiring ambiguities to be construed favorably to tribes] applies only to federal statutes that are 'passed for the benefit of dependent Indian tribes'"). *Tuscarora* again is relevant because there, despite the express inclusion of "Indian reservations" within the definition of "reservations," this Court relied on a combination of legislative history and internal statutory construction to limit the term to government-owned interests

[6] That the term "reservation" ordinarily encompasses Indian reservations also was noted by the *Tuscarora* Court when it stated that even though "by generally accepted standards and common understanding these Tuscarora lands may be part of a 'reservation,'" such fact was "not at all decisive of whether they are such within the meaning of the Federal Power Act." 362 U.S. at 111. Congress instead "was free and competent artificially to define the term 'reservation' for the purposes that it prescribed in the Act." *Id.* The Hayden-Cartwright Act contains no such "artificial[ ]" limitation.

and lands despite the prejudicial impact on the tribe from that construction. 362 U.S. at 111-14. More recently in *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the Court declined to construe 5 U.S.C. § 552(b)(5), the Freedom of Information Act's ("FOIA") intra-agency exception, as authorizing nondisclosure of communications between a federal agency and a tribe. In making this determination, neither the Court in its decision nor the United States in its briefs made reference to the Indian canons. *E.g.*, Brief for Petitioners at 14-17 (summary of argument), *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (No. 99-1871). The Government instead argued unsuccessfully that its fiduciary obligation to tribes provided the predicate for inferring the exemption's applicability because such duty cloaked federal-tribal communications with the same "inter-agency" status as enjoyed by outside consultants advising agencies and because FOIA should not be construed to require agencies to act other than in a tribe's best interests when called upon to disclose federal-tribal communications. 532 U.S. at 12-16.

The propriety of the South Dakota Supreme Court's approach to construing the Hayden-Cartwright Act warrants immediate review. Not only has the Act's application been litigated intensely in other States over the last several years, but lower federal courts also have struggled with determining when tribes are subject to "general" federal statutes. With respect to the question of the Act's applicability to Indian reservations, Executive Branch opinions issued shortly after its passage left no doubt that the state motor fuel taxes could be applied to reservation sales. 38 Op. Att'y Gen. 522 (1936) (Pet. App. 80); 57 Interior Dec. 129 (1940) (Pet. App. 84). Although the South

Dakota court discounted their reasoning, those opinions constituted authoritative construction of the statute and provided a basis for the States' assumption that their fuel taxes could be applied to reservation transactions. They represented, moreover, the *sole* authority until *In re Motor Fuel Tax Liability of A.G.E.*, 273 N.W.2d 737 (S.D. 1978), where the South Dakota court stated that the Hayden-Cartwright Act *did* apply to Indian reservations. *Id.* at 739.[7] The first contrary decision was the Idaho Supreme Court's opinion in *Goodman Oil* rendered 65 years after the Act's adoption, which initiated use of the Indian canons as justification for reading the statute at odds with its literal language.[8] Prompt resolution of this issue will dispel the present uncertainty over state motor fuel taxation authority on Indian reservations and, if the Act is

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[7] The decision below characterized *A.G.E.*'s statement concerning the Hayden-Cartwright Act as dicta and then distinguished the earlier case because there, unlike here, a non-Indian taxpayer was involved. Pet. App. 21-22. The court did not explain how the term "reservation" in the Act encompasses Indian reservations when non-Indians are the taxpayer but excludes them when a tribal member is the taxpayer.

[8] During that 65-year period, Congress took no action to modify the Executive Branch construction as to the scope of the term "reservations." The sole substantive modification occurred in the Buck Act, Pub. L. No. 76-819, § 7, 54 Stat. 1059, 1060 (1940), and involved substituting the phrase "upon, with respect to, or measured by, sales, purchases, storage or use of gasoline or other motor vehicle fuels" for the phrase "upon sales of gasoline or other motor vehicle fuels" that appeared in the 1936 law. The Buck Act amendment addressed a limiting construction given the original statute because of its reference only to "sales." S. Rep. No. 76-1625, at 2 (1940); *see also Minnesota v. Keeley*, 126 F.2d 863, 866 (8th Cir. 1942). Aside from the Buck Act amendment, the other modifications to the original section 10 of the Act entailed recodification (Pub. L. No. 80-279, § 104, 61 Stat. 641, 644 (1947)) and the addition to § 104 of subsection (c) (Pub. L. No. 84-876, 70 Stat. 799 (1956)).

held not to apply, will allow States to determine whether adjustment of fuel tax legal incidence or other legislative responses are appropriate. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995).

The broader question concerning the reach of *Tuscarora's* holding is no less important. The Tenth Circuit Court of Appeals has limited the holding to federal statutes that affect "property rights." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (*en banc*) (section 8(a)(3) of the National Labor Relations Act does not preclude a tribe from adopting ordinance prohibiting union security agreements). Other federal courts of appeals recognize exceptions to *Tuscarora* where, *inter alia*, "the law touches 'exclusive rights of self-governance in purely intramural matters'" or "there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'" *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). Courts have invoked these exceptions to find the Age Discrimination in Employment Act and the Fair Labor Standards Act overtime compensation requirements inapplicable to tribal entities. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001); *Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490, 493-96 (7th Cir. 1993); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993). Review of the South Dakota Supreme Court's judgment will afford this Court the opportunity to reiterate or clarify the *Tuscarora* holding.

II. BECAUSE THE SOUTH DAKOTA SUPREME COURT DEPARTED FROM ESTABLISHED FEDERAL LAW PRINCIPLES IN HOLDING A STATE LAW-CREATED CORPORATION IS ENTITLED TO IMMUNITY FROM MOTOR FUEL TAXATION, REVIEW IS WARRANTED.

Muddy Creek is incorporated under South Dakota statutes. As the state supreme court has stated on repeated occasions, "[a] firmly entrenched doctrine of American law is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors and shareholders until there is a *sufficient reason* to the contrary." *Kan. Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 111 (S.D. 1994); *accord Osloond v. Osloond*, 609 N.W.2d 118, 122 (S.D. 2000); *Brevet Int'l, Inc. v. Great Plains Luggage Co.*, 604 N.W.2d 268, 273-74 (S.D. 2000). It explained further in *Kansas Gas & Electric* that the separate legal status of corporations "is considered the central purpose for choosing the corporate form because it permits corporate shareholders to limit their personal liability to the extent of their investments." 521 N.W.2d at 111. Like other American jurisdictions, South Dakota recognizes that the "corporate veil" may be pierced "to disregard the distinction between a corporation and its shareholders to prevent fraud or injustice" – *i.e.*, when the corporate form is used by shareholders, officers, or directors "to *defeat* public convenience, justify wrong, protect fraud, or defend crime." *Id.* (emphasis supplied). The veil is pierced, in other words, to impose individual liability for obligations nominally those of the corporation because of illegal or inequitable conduct by the shareholder, officer, or director.

The individual liability of Respondent Pourier is not in issue. The only liability at stake is Muddy Creek's – a fact reflected in its, and not Pourier's, status under South Dakota as an importer responsible for motor fuel tax prepayment and as a taxpayer entitled to any refunds for fuel used by corporate vehicles. The corporation, not Pourier, filed the tax refund claims. Pet. App. 53-54. Indeed, nothing in the decision below even suggests that Pourier had standing to challenge the fuel tax. *See* Pet. App. 33 (Muddy Creek possessed standing to bring suit). No allegation of wrongdoing on the part of either Respondent exists. This case is not an instance where the ordinary distinction between corporation and shareholder is disregarded as a matter of state law, and the South Dakota Supreme Court did not so hold.

It is also not a case, as the South Dakota court *did* hold, where that distinction should be ignored as a matter of federal law. This Court determined 25 years ago that the critical distinction between the categorical rule precluding state taxation on Indian reservations absent congressional authorization is membership status in the resident tribe. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 160-61 (1980); *see also Rice v. Rehner*, 463 U.S. 713, 720 (1983) (applying distinction to non-tax state civil regulation); *cf. Chippewa Trading Co. v. Cox*, No. 03-1445, 2004 WL 828087, at *6 (6th Cir. Apr. 19, 2004) (tribally-chartered corporation does not constitute an "Indian tribe or band" under 28 U.S.C. § 1362 and therefore is subject to jurisdictional limitation in 28 U.S.C. § 1341). Nonmember Indians and non-Indians therefore are situated identically for civil regulatory purposes. This conclusion necessarily follows for artificial persons such as corporations that are ineligible for ancestry-based tribal

membership. *See* Pet. App. 56 (Pourier is a member of the Oglala Sioux Tribe by virtue of 11/32nds blood quantum). No more tenable is the proposition that a corporation may enjoy derivative tribal membership, since the very purpose of incorporation under South Dakota's and other States' law is to establish a new legal "person" separate and apart from the individuals or other entities that may own or operate the corporation. The South Dakota court simply lost its way and ruled in square opposition to this Court's precedent.[9]

While mere error alone might not warrant review, other considerations specific to the unique relationship between States and tribes do. This Court has stressed the importance in the Indian-law tax context of "'reasonably bright-line standard[s] which, from a tax administration perspective, respond[] to the need for substantial certainty as to the permissible scope of state taxation authority.'" *Chickasaw Nation*, 515 U.S. at 460. Principal among those standards is the "bright-line" distinction between members of the resident tribe and *all* others, whether Indian or non-Indian, for civil-regulatory purposes. The South

[9] The court's reliance on regulations implementing the Indian Business Development Program or more generalized economic development "[p]olicy considerations" (Pet. App. 31) was misplaced. Department of the Interior regulations deem Indian-owned corporations eligible for grants, but that fact says nothing germane about whether the corporations enjoy immunity from state taxation because of such ownership. This Court, moreover, has rejected broad-based claims of interference with economic development as a basis for preemption. *Colville*, 447 U.S. at 155-56. Among the statutes cited by the non-prevailing preemption proponents in *Colville* was the Indian Financing Act of 1974, Pub. L. No. 93-262, 86 Stat. 77 (codified as amended at 25 U.S.C. §§ 1451-1544), which created the Indian Business Development Program in 25 U.S.C. § 1521.

Dakota court's analysis and result thereby invite confusion in an area where clarity is essential for States, tribes, and taxpayers.

So, for example, the court's reasoning may be advanced to establish *pro tanto* "member" status for corporations that are partly owned by tribal members – *i.e.*, an immunity from taxation proportionate to the amount of tribal member ownership. The ramifications of the court's reasoning additionally are not restricted to taxation and provide fodder for controversy in other civil-regulatory contexts. To use another example, application of on-reservation state environmental laws, which otherwise could be enforced against a nonmember, may be compromised where the corporation's equity is owned by a tribal member. Substantially more stringent preemption standards apply when a State attempts to enforce its civil regulatory laws against members than against nonmembers. *Compare New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("exceptional circumstances" required before state civil regulatory authority exists over tribal members with respect to on-reservation activity), *with County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) ("[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (interest-balancing test applied to on-reservation civil regulation of nonmembers doing business with tribe). The South Dakota Supreme Court's departure from the path painstakingly blazed by this Court should be rectified now.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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May 2004

APPENDIX

Section 10 of the Hayden-Cartwright Act As Amended And Codified In 4 U.S.C. § 104

§ 104. Tax on motor fuel sold on military or other reservation reports to State taxing authority

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.